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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 2705
Sup. Ct.

No. [redacted] 57

RAILROAD COMMISSION OF TEXAS, LON A. SMITH, ERNEST O. THOMPSON, ET AL., ETC.,

*Appellants,*

*vs.*

HUMBLE OIL AND REFINING COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

# STATEMENT AS TO JURISDICTION.

GERALD C. MANN,
*Attorney General of Texas;*
JAMES P. HART,
E. R. SIMMONS,
EDGAR CALE,
TOM D. ROWELL, JR.,
*Assistant Attorneys General of Texas,*
*Counsel for Appellants.*

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IN THE

# DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

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## Civil Action No. 31

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HUMBLE OIL & REFINING COMPANY,

*Plaintiff,*

*vs.*

RAILROAD COMMISSION OF TEXAS, LON A. SMITH, E. O. THOMPSON, AND G. A. SADLER, AND GERALD C. MANN, ATTORNEY GENERAL OF TEXAS, IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES,

*Defendants.*

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## STATEMENT AS TO JURISDICTION AS REQUIRED BY SUPREME COURT RULE 12.

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The jurisdiction of the Supreme Court of the United States is invoked under Sections 238 and 266 of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code, Title 28, Sections 345 and 380).

The judgment here appealed from was entered by the three-judge District Court on the 19th day of March, 1940. Petition for appeal is herewith presented on the 1st day of April, 1940.

This action was brought by Humble Oil & Refining Company, a Texas corporation, against the Railroad Commission of Texas, and Lon A. Smith, E. O. Thompson, and G. A. Sadler, in their official capacities as members of and composing the Railroad Commission of Texas, and Gerald C. Mann, Attorney General of Texas, in his official capacity as such, and against all of said defendants individually, to enjoin the enforcement of proration orders issued by the Railroad Commission of Texas limiting and prorating the production of oil from the East Texas oil field. The plaintiff sought interlocutory injunctive relief, as well as final injunctive relief, against the Railroad Commission of Texas and the Attorney General of Texas to restrain said officers of the State of Texas in the enforcement and execution of such proration orders made by the Railroad Commission of Texas acting under and pursuant to the statutes of the State of Texas. The plaintiff asserted that such injunctive relief against said officers should be granted upon the ground of the unconstitutionality of such proration orders, because they deprived the plaintiff of its property without due process of law and denied to it the equal protection of the laws in violation of the 14th amendment to the Constitution of the United States.

In its complaint filed in the District Court of the United States for the Western District of Texas, Austin Division, on the 26th day of July, 1939, the plaintiff attacked the validity under the United States Constitution of the proration order of the Railroad Commission of Texas, dated June 19, 1939, in so far as said order fixed the allowable production of oil from the East Texas oil field. The portion of said order which was attacked by the plaintiff in its complaint was as follows:

> "Rule 23 (2) of Division 3, as contained in an order of the Commission dated October 17, 1933, pertaining

to the East Texas Field is hereby re-adopted and amended as follows:

"Whereas, The Railroad Commission of Texas finds from evidence submitted to it at a hearing held in Austin on June 12, 1939, and at previous hearings held before the regulatory body that the reservoir of the East Texas Field has its energy supplied by a hydrostatic drive which encroaches from the west to the east, and only a certain amount of crude oil can be withdrawn daily from the East Texas Reservoir in order to utilize to the greatest extent the energy necessary for the production and recovery of the greatest amount of oil ultimately from the reservoir. It has been recommended to the Commission by competent engineers that not more than 425,000 to 450,000 barrels of crude oil should be allowed to be produced from the East Texas Reservoir in any one day in order that the reservoir might be depleted with the least possible amount of waste incurring. Evidence has also been submitted to the Commission at these hearings that the production of from 425,000 to 450,000 barrels of crude oil will prohibit the coning of water, the uneven encroachment of water, and the subsequent trapping of much oil which otherwise, under higher daily allowables of crude oil, would not be recovered.

"Rule 23. (2) Therefore, It Is Further Ordered By the Railroad Commission of Texas that during each twenty-four (24) hour period beginning at 7 o'clock a. m., Central Standard Time, July 1, 1939, the owner or operator or manager of each well in the East Texas Field shall be permitted, either collectively or individually, to produce daily from each well a maximum of Two and Thirty-two Hundredths Per Cent (2.32%) of its hourly potential capacity as determined by the Commission. Provided, however, that the above order shall not be enforced as to the property of Rowan & Nichols Oil Company, involved in Cause No. 624 in Equity in the United States District Court for the Western District of Texas, Austin Division, insofar as the enforcement of this order is prohibited by the injunction issued by said Court on June 14, 1939, and so long as said injunction is in force and effect."

The contention of the plaintiff in its complaint was that, as applied, construed and enforced by the Railroad Commission of Texas, the said proration order of June 19, 1939, amounted to a proration of the East Texas oil field upon practically a per-well basis, since the Railroad Commission did not apply the formula set forth in the order of June 19, 1939, to any well where the application of said formula would reduce the daily allowable production of such well below twenty barrels a day, and permitted every well, which was capable of producing that amount, to produce at least twenty barrels per day. Plaintiff alleged that it was the owner of not less than 14 per cent of the oil in the field and that it should currently be allowed to produce daily an amount of oil substantially equal to 14 per cent of the total daily field allowable, but that the Railroad Commission under the order of June 19, 1939, permitted the plaintiff to produce currently only approximately 9.932 per cent of the daily field allowable, and thereby deprived the plaintiff of an amount of oil equal to about four per cent of the total daily field allowable.

Upon the filing of the complaint, an order was entered by the Judge of the District Court convening a three-judge District Court for August 10, 1939, to hear the plaintiff's application for a temporary injunction. The three-judge District Court, composed of Circuit Judge Edwin R. Holmes, and District Judges Robert J. McMillan and T. M. Kennerly convened at San Antonio, Texas. The defendants filed a motion for a more definite statement and for a bill of particulars, and raised the defense that the action was premature, in that the plaintiff had not exhausted its administrative remedy since it had applied for an increase in its allowable to the Railroad Commission and the Railroad Commission then had pending before it and set for hearing on August 16, 1939, the plaintiff's application for an increase in the allowable on its leases. The defendants also

filed their answer, alleging that the proration order complained of was reasonable and fair, and that the plaintiff would recover its fair share of the oil during the producing life of its leases.

The three-judge District Court overruled the defendants' motions and, upon hearing evidence offered, on August 11, 1939, entered a temporary injunction enjoining the Railroad Commission and the Attorney General from enforcing the proration order of June 19, 1939, and the schedules issued in connection therewith, and further enjoined the defendants from interfering with the plaintiff in daily producing from its wells "an amount of oil not exceeding 144% of the amount now allowed to each and all of complainant's said wells under said proration order of June 19, 1939, and the schedule issued in connection therewith for said field."

No appeal was taken from the temporary injunction entered by the court on August 11, 1939. On August 16, 1939, the Railroad Commission of Texas proceeded with its previously scheduled hearing on the application of Humble Oil & Refining Company for an increase in the allowables for the wells on its leases, and the Commission heard evidence generally with reference to the advisability of changing the proration order for the East Texas oil field. On September 11, 1939, after the completion of the hearing on said application, the Railroad Commission of Texas entered its order, dated September 11, 1939, containing the following provisions as to the proration of the allowable production from the East Texas field:

> "RULE 23. (A) Not more than 690,000 barrels of crude oil shall be produced from the East Texas Field during any day of the effective period of this order.
>
> "(B) The total daily allowable for the field shall be distributed among the producing wells in the field on the following basis:

"1. Each well capable of producing twenty (20) barrels of crude oil per day shall be allowed to produce twenty (20) barrels per day,

"2. Each well incapable of producing twenty (20) barrels per day shall be allowed to produce daily that amount of oil which it is capable of producing in a 24-hour period, not in excess of twenty (20) barrels,

"3. In addition to the twenty (20) barrels provided for in one (1) above, each well in the field which is capable of producing in excess of twenty (20) barrels daily shall be allowed to produce daily that proportion of the total daily allowable for the field remaining after deductions for one (1) and two (2) above have been made, that the product of such well's hourly potential by its bottom-hole pressure by the thickness of the saturated Woodbine sand underlying the well by the average number of acres per well in the lease bears to the sum of such products for all of the wells in the field."

On September 29, 1939, the Railroad Commission of Texas entered a new order fixing the allowable production of crude oil in the various fields in Texas, and readopted and amended the order of September 11, 1939, with reference to the East Texas oil field, as follows:

"RULE 23 of Division 3, as contained in an Order of the Commission dated October 17, 1933, pertaining to the EAST TEXAS FIELD as amended by an Order of the Commission dated September 11, 1939, is hereby readopted and amended as follows:

"WHEREAS, The Commission finds that in order to prevent waste in said field that the allowable production during the month of October, 1939, should not average more than 490,000 barrels per day over the thirty-one (31) day period, and that no more than 690,000 barrels of crude oil should be produced from the East Texas

Field in any one day during the month of October, 1939, and

"WHEREAS, The Commission finds that there exists a market demand for crude oil produced in such an amount in the East Texas Field during the month of October, 1939:

"IT IS THEREFORE ORDERED That Rule 23, of Division 3, of the Commission's Order of October 17, 1933, pertaining to the East Texas Field be and it is hereby amended to read, effective October 1, 1939, as follows:

"RULE 23. (a) Not more than 690,000 barrels of crude oil shall be produced from the East Texas Field during any day of the effective period of this Order.

"(b) The total daily allowable for the field shall be distributed among the producing wells in the field on the following basis:

"1. Each well capable of producing twenty (20) barrels of crude oil per day shall be allowed to produce twenty (20) barrels per day.

"2. Each well incapable of producing twenty (20) barrels per day shall be allowed to produce daily that amount of oil which it is capable of producing in a 24-hour period, not in excess of twenty (20) barrels.

"3. In addition to the twenty (20) barrels provided for in one (1) above, each well in the field which is capable of producing in excess of twenty (20) barrels daily shall be allowed to produce daily that proportion of the total daily allowable for the field remaining after deductions for one (1) and two (2) above have been made, that the product of such well's hourly potential by its bottom-hole pressure by the thickness of the saturated Woodbine Sand underlying the well by the average number of acres per well in the lease bears to the sum of such products for all of the wells in the field."

On October 3, 1939, the plaintiff filed a supplemental complaint whereby it asserted the invalidity of the proration orders of September 11, 1939, and September 29, 1939, quoted above, as being in violation of the equal protection and due process clauses of the 14th amendment to the Constitution of the United States, and seeking temporary and final injunctive relief to restrain the Railroad Commission of Texas and the Attorney General of Texas from the enforcement and execution of said orders. The plaintiff further asserted in said supplemental complaint that the orders of September 11, 1939, and September 29, 1939, were in violation of the preliminary injunction issued by the court on August 11, 1939. In said supplemental complaint, the plaintiff asserted that it owned approximately 14.3 per cent of the recoverable oil in the East Texas field, and that it should be allowed currently to produce substantially 14.3 per cent of the daily total field allowable, but that under the orders attacked, the plaintiff was currently permitted to produce only about 11.15 per cent of the total daily field allowable, and that it was thereby deprived of the opportunity to produce approximately 3.15 per cent of the daily allowable production for the East Texas field.

Upon the filing of the supplemental complaint, an order was entered by the Judge of the District Court convening a three-judge District Court at Houston, Texas, on October 12, 1939. Said court was convened on said date with Circuit Judge Rufus E. Foster and District Judges William H. Atwell and T. M. Kennerly sitting. The defendants filed an answer to the supplemental complaint, alleging that the orders of the Railroad Commission were valid and reasonable, and that the plaintiff under said proration orders would recover substantially the equivalent of the oil beneath its leases.

Evidence was submitted before the three-judge District Court on October 12, 1939, and the court took the case under advisement and requested briefs from both sides which were duly submitted. On November 10, 1939, the court entered its decree denying to the plaintiff a second temporary injunction.

A copy of the decree of November 10, 1939, denying a second temporary injunction, together with the court's findings of fact and conclusions of law, is attached hereto as "Exhibit 'A'."

No appeal was taken from the decree of November 10, 1939, denying a second temporary injunction.

The action came on for hearing on the prayer for a permanent injunction at Austin, Texas, on February 13, 1940, the three-judge District Court then consisting of Circuit Judge Samuel H. Sibley, and District Judges Robert J. McMillan and James V. Allred. In the meantime, the Railroad Commission of Texas had issued monthly proration orders for the East Texas oil field, continuing substantially the same method of proration as that established by the orders of September 11, 1939, and September 29, 1939. It was stipulated by the parties at the trial that it would be unnecessary for the plaintiff to amend its pleadings or to file supplemental pleadings showing the promulgation of such orders continuing substantially the same method of proration, and that any judgment entered by the court should apply to any orders continuing substantially the same method of proration as that established by the orders of September 11, 1939, and September 29, 1939.

This cause was heard jointly, under the provisions of Rule 42 (a) of the Rules of Civil Procedure, with Civil Action No. 36, entitled *F. W. Fischer*, Plaintiff, v. *Lon A. Smith, et al.*, Defendants, and Civil Action No. 46, entitled *Rowan & Nichols Oil Company*, Plaintiff, v. *Railroad Com-*

*mission of Texas, et al.*, Defendants, since all of said actions involved common questions of law and fact.

The hearing of evidence in said actions was completed on February 16, 1940, and the court took the case under advisement until February 21, 1940, when it then announced that it would enter judgment in favor of the plaintiff, in this action, and also in favor of the plaintiff in Civil Action No. 46, entitled *Rowan & Nichols Oil Co.* v. *Railroad Commission of Texas, et al.*, permanently enjoining the said defendants in the enforcement and execution of the proration orders attacked. The court then stated, however, that it would withhold entering its decree for a period of 10 days, during which time the Railroad Commission could consider whether it would submit to said judgment or would appeal. The court announced that if the Railroad Commission decided to enter a new proration order and submit to the judgment of the court, it would be given additional time within which to hold a hearing. A copy of the opinion delivered by the court on February 21, 1940, is attached hereto and marked Exhibit "B".

On March 1, 1940, the Railroad Commission communicated to the court its intention to appeal the case. At the same time, the Railroad Commission filed a motion for a stay pending appeal, alleging that unless a stay was granted, serious and irreparable damage would be done to the whole East Texas oil field and to the oil industry in the State of Texas as a whole, and that the defendants would in effect be deprived of their right of appeal. The three-judge District Court was reconvened at Houston, Texas, on March 14, 1940, Circuit Judge Samuel H. Sibley and District Judge Robert J. McMillan being present, but District Judge James V. Allred being unable to attend. The defendants presented to the court their motion for a stay of the judgment pending appeal and the two judges then sitting announced that a

stay would be granted for a period of sixty days from the date of the judgment. Thereafter, on March 19, 1940, a final judgment was entered by the court, permanently enjoining the defendants from enforcing or executing the orders of the Railroad Commission attacked, and further providing that the injunction should be stayed for a period of sixty days from the date of the judgment.

A copy of the final judgment of March 19, 1940, is attached hereto and marked "Exhibit C". A copy of the findings of fact and conclusions of law which were filed on March 19, 1940, is attached hereto and marked "Exhibit D".

The Railroad Commission of Texas is an administrative commission acting under and pursuant to the statutes of the State of Texas, relating to the conservation of oil and gas, Revised Civil Statutes of Texas, Title 102. In this action the plaintiff sought interlocutory injunctive relief, as well as final injunctive relief, suspending and restraining the enforcement of orders of the Railroad Commission of Texas, acting under and pursuant to the statutes of the State of Texas and restraining the action of the Railroad Commission of Texas and its members and the Attorney General of Texas in the enforcement and execution of such orders.

The issues in this appeal are similar to those in the case of *Railroad Commission of Texas, et al.*, v. *Rowan & Nichols Oil Company*, petition for certiorari granted March 11, 1940, and now pending before the Supreme Court of the United States, Case No. 681.

The appeal prayed for is to the Supreme Court of the United States from the final judgment granting a permanent injunction, and is provided for by the Act of February 13, 1925, C. 299, Section 1 (28 U. S. C., Section 380).

The cases believed to sustain the jurisdiction of the Supreme Court of the United States upon this appeal are:

*Stratton* v. *St. Louis, Southwestern Railway Company*, 282 U. S. 10;

*Oklahoma Natural Gas Company* v. *Russell*, 261 U. S. 290.

Respectfully submitted,

(S.) GERALD C. MANN,
*Attorney General of Texas,*
(S.) JAMES P. HART,
*Assistant Attorney General,*
(S.) E. R. SIMMONS,
*Assistant Attorney General,*
(S.) EDGAR CALE,
*Assistant Attorney General,*
(S.) TOM D. ROWELL, JR.,
*Assistant Attorney General,*
*Attorneys for Defendants,*
*Austin, Texas.*

## EXHIBIT "A".

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION.

Civil Action No. 31.

HUMBLE OIL & REFINING COMPANY, *Plaintiff*,

*vs*

RAILROAD COMMISSION OF TEXAS *et al.*, *Defendants*.

By the COURT:

This suit was brought on July 26th, 1939, by the Humble Oil and Refining Company against the Railroad Commission of Texas, its members and the Attorney General of Texas to enjoin them from enforcing an order of June 19, fixing the amount of oil allowed to be produced by each well in the East Texas Oil Field.

A hearing was had before a statutory court of three judges, composed of Holmes, Circuit Judge, and McMillan and Kennerly, District Judges. A decree was entered on August 11, 1931, granting an interlocutory injunction as prayed for, upon plaintiff giving bond in the sum of $5,000.00.

On October 3d, 1939, plaintiff filed a supplemental complaint alleging that an additional order of the Railroad Commission issued on September 29th, 1939, was violative of the interlocutory injunction, was unreasonable, arbitrary and confiscatory and deprived complainant of its property without due process of law. Owing to the serious illness of District Judge McMillan and conflicting judicial engagements of Circuit Judge Holmes, a statutory court of three judges composed of Foster, Circuit Judge, and Atwell and Kennerly, District Judges, both of whom had been assigned to the Western District of Texas, was assembled and a hearing was had on October 12, 1939. Numerous affidavits and maps were introduced in evidence and the case was argued and submitted.

The affidavits tend to show many complicated facts pro and con as to the discretion exercised by the Commission in entering the order of September 29, 1939. It is unnecessary to consider and analyze them for the purpose of this hearing. There is no substantial difference between the parties as to the material facts, which we find as follows.

The East Texas Oil Field has 133,000 producing acres. Plaintiff has producing leases covering 14,691 acres. The oil bearing sand varies in thickness throughout the field. There are approximately 25,000 wells in the field. The order of June 19, 1939, fixed the top daily allowable at 520,000 barrels and permitted each well to produce only 2.32 per cent of its hourly potential production. However, some 19,000 wells, not capable of producing in excess of 20 barrels a day were allowed to produce 20 barrels per day or all they could to that limit, regardless of whether their allowable measured by the percentage of their hourly potential production would reach that figure. Other wells were held to the 2.32 per cent of their hourly potential. Under this order no well was allowed to produce more than 26 barrels per day.

The injunction heretofore issued enjoined the defendants from enforcing against plaintiff the order of June 19, 1939, and any other orders substantially the same; and from interfering with plaintiff in producing daily 144 per cent of the amount of oil plaintiff was allowed to produce from its wells under the order. Necessarily, this percentage was intended to be based upon an allowable of 520,000 barrels a day.

The order of September 29th provides as follows:

"Rule 23. (a) Not more than 690,000 barrels of crude oil shall be produced from the East Texas Field during any day of the effective period of this Order.

"(b) The total daily allowable for the field shall be distributed among the producing wells in the field on the following basis:

"1. Each well capable of producing twenty (20) barrels of crude oil per day shall be allowed to produce twenty (20) barrels per day.

"2. Each well incapable of producing twenty (20) barrels per day shall be allowed to produce daily that amount of oil which it is capable of producing in a 24-hour period, not in excess of twenty (20) barrels.

"3. In addition to the twenty (20) barrels provided for in one (1) above, each well in the field which is capable of producing in excess of twenty (20) barrels daily shall be allowed to produce daily that proportion of the total daily allowable for the field remaining after deductions for one (1) and two (2) above have been made, that the product of such well's hourly potential by its bottom-hole pressure by the thickness of the saturated Woodbine Sand underlying the well by the average number of acres per well in the lease bears to the sum of such products for all of the wells in the field."

Under the provisions of the order of September 29th plaintiff was allowed to produce about 11.15 per cent of 690,000 barrels, which would amount to about 148 per cent of 520,000. This would be approximately 76,960 barrels daily under the new order as against 74,880 barrels under the old order, an increase of production of about 2000 barrels daily. The daily average production from the field is materially reduced by the shutting down of the wells under orders of the Commission on certain days in each month. But the figures retain substantially the same comparative value.

Conclusions of Law.

Under the law of Texas the holder of an oil lease is the owner of the oil in place under the lease and is entitled to produce his fair share of the oil drawn from the common reservoir. The Railroad Commission has authority to prorate the amount each well shall be allowed to produce but its orders must be reasonable and fair. The findings of fact by the Commission are not conclusive and any party in interest has the right to appeal to the courts for relief. However, orders of the Commission, promulgated after a hearing, are entitled to weight prima facie. Usually, courts do not permanently set them aside unless convinced they are invalid, after a hearing on the merits. In this case the interlocutory injunction issued to prevent irreparable loss until

a hearing could be had on the merits and final decree entered. It is apparent from the above facts that the order of September 29th does not deprive plaintiff of the benefit of the interlocutory injunction heretofore issued. There is no occasion to enter another interlocutory decree at this time.

The application should, therefore, be denied.

Endorsed: No. 31 Civil Action United States District Court, Western District of Texas, Austin Division, Humble Oil and Refining Company vs. Railroad Commission of Texas, et al. Opinion of Three-Judge Court on Application for Second Interlocutory Injunction. Filed 10th day of November, 1939, Maxey Hart, Clerk, by Joe Steiner, Deputy.

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DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION.

Civil Action No. 31.

HUMBLE OIL AND REFINING COMPANY, *Plaintiff*,

*vs.*

RAILROAD COMMISSION OF TEXAS *et al.*, *Defendants*.

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For the written reasons on file it is Ordered, Adjudged and Decreed that the application for a second interlocutory injunction herein be Denied.

(Signed) RUFUS E. FOSTER,
*U. S. Circuit Judge.*

(Signed) WM. H. ATWELL,
*U. S. District Judge.*

In signing this Order, I make this comment. I do not wholly agree with the written reasons filed, but think the Second Interlocutory Injunction should be denied.

(Signed) T. M. KENNERLY,
*U. S. District Judge.*

## EXHIBIT "B".

United States District Court, Western District of Texas, Austin Division.

No. 31 Civil, Humble Oil & Refining Co. *v.* Railroad Commission of Texas, et al.

Attorneys for Plaintiff: Rex G. Baker, E. E. Townes, R. E. Seagler, Felix A. Raymer, Carl Illig, Jr., R. E. Hardwicke, Powell, Rauhut & Gideon.

Attorneys for Defendants: Gerald C. Mann, Attorney General of Texas, James P. Hart, D. D. Mahon, E. R. Simmons, Tom D. Rowell, Jr., Edgar Cale, and Lee Shoptaw, Assistant Attorney Generals.

No. 36 Civil, F. W. Fischer *v.* Lon A. Smith, et al.

Attorneys for Plaintiff: F. W. Fischer, W. T. Saye.

Attorneys for Defendants: Gerald C. Mann, Attorney General of Texas, James P. Hart, D. D. Mahon, E. R. Simmons, Tom D. Rowell, Jr., Edgar Cale, and Lee Shoptaw, Assistant Attorney Generals.

No. 46 Civil, Rowan & Nichols Oil Co. *v.* Railroad Commission of Texas, et al.

Attorneys for Plaintiff: Dan Moody, Rice M. Tilley.

Attorneys for Defendants: Gerald C. Mann, Attorney General of Texas, James P. Hart, D. D. Mahon, E. R. Simmons, Tom D. Rowell, Jr., Edgar Cale, and Lee Shoptaw, Assistant Attorney Generals.

### Tentative Conclusions of Law.

Judge Sibley: Are counsel present in the oil cases? They don't have to be.

Mr. Baker: Yes, sir, I am here for the Humble.

Mr. Cale? The Railroad Commission is represented. I don't believe Mr. Fischer has a representative here. I don't know.

Judge Sibley: He wouldn't have to be, of course. We are about, gentlemen, to announce our conclusions in a general way in these cases. The paper I am about to read is not final. It is in the nature of conclusions of law, but we reserve the right to modify or change them to meet more exactly our views, to express more exactly what we think the

law is, if it becomes necessary, but for the present purposes, I read these conclusions, disposing of the cases.

First, the court has jurisdiction in each case.

Second, in the case of F. W. Fischer, an injunction, either temporary or permanent, ought not to be granted, because no irreparable injury is shown to him by the operation of the order. It does not operate unreasonably as to him.

We find, as will appear, that the situation is otherwise as to the other litigants. We think that the present injury to each of them is clear, practically admitted, and the only reply to it is that in the future the injury under this order may be returned to them. We regard that contingency as so uncertain as to make it our duty to look principally to the present operation, and to say that they have established such an injury in its nature irreparable, and without any other remedy at law as to make it our duty to examine the order.

That part of the order which fixed the top allowable made to prevent waste, the Commission had power to make, and it is not arbitrary or unreasonable. The statute which declares that pumping wells of the depth that all wells have in the East Texas oil field and which can produce no more than twenty barrels per day in thirty consecutive days are "marginal wells", and not to be restricted by the Commission, is not patently invalid. These wells are almost wholly on the edges of the field and are approaching exhaustion. The Legislature could make of them a separate class, and in view of the expense of operating them by pumping and of their probable short life, the fixed allowable granted them is probably not arbitrarily fixed. The amount of the present top allowable to them is less than one per cent, and the effect of it on the fairway wells which are here complaining is too uncertain and insignificant to require a decision on the constitutionality of the statutory classification.

The portion of the order which prorates the remainder of the top allowable among the non-marginal leases and wells so operates that about three-fourths of it is distributed on a flat basis per well so as to give each well an initial twenty barrels per day, but with three days of shut down each week, it makes an equivalent of about 11.7 barrels per day. The remaining one-fourth is prorated by a formula

which takes account of the productive capacity or potential of each well, and the acreage, sand thickness, and bottom hole pressure of each lease, all as factors in fixing the allowable for the wells on the lease. This operates to restrict more drastically the production from the best wells and leases in the fairway, where all those of Rowan & Nichols Company are and most of those of Humble Oil Company, than that from less productive wells to the East and West, and that from more densely drilled leases in the fairway. Is this result so unreasonable as to make the order contrary to the statute or the Fourteenth Amendment?

The question under the two seems to be approximately the same. If the proration is unreasonable, the statute doesn't give the Commission authority to make it. If it is so unreasonable as to be arbitrary, the Constitution does not permit it to be done either by the Legislature or the Commission.

The Commission as to all wells at first made a straight per well proration. The Commission's orders of this sort were held unreasonable. A later order which combined well potential with a flat per well allowance so that about half of the total was distributed according to potential was upheld as reasonable. It is not now urged that no basic flat per well allowable should be made, but only that three-fourths of the whole should not reasonably be so apportioned. The reason for distributing three-fourths of the allowable on a flat basis per well, or for distributing any of it on that basis, is not precisely disclosed. As in the case of marginal wells, it seems to be thought necessary in order to keep the poorer wells, especially those having to be pumped, going at all. If they were forced out, the oil they would produce might in fact never be produced, causing waste; or shut down might be a deprivation of their owners' property contrary to the Constitution. The evidence here, however, is that even with a pumping well production can be profitably continued on five to ten barrels per day. We can think of no reason why a higher allowable per day should be fixed for non-marginal wells when to do so makes three-fourths of the distributable oil go neither according to the productive capacity of the wells nor according to the oil belonging to the several leases.

That the Legislature fixed a figure of twenty barrels for marginal wells is without great significance, for they are perishing wells. Others which are near the border line will soon enough enter that class, and need not prematurely be treated as such. The drilling density of wells is so diverse on different leases otherwise comparable that to distribute three-fourths of a top allowable on a flat basis per well without reference to the oil reserves of the lease or the productive capacity of those wells, which constitute the value of the property, is unreasonable and therefore in violation of the Constitution and the statute. It is not for us to suggest a proportion or a formula. We think the present proportion unsustainable.

We do not say that the time element, the probable life of the wells, may not be considered in an apportionment, though there is necessarily much uncertainty involved. We do not say that either presently or ultimately each lease must be allowed to produce in exact proportion either to its present or original oil in place. All of these may be given a reasonable consideration, sacrificing property interests as little as may be in the effort to achieve the public aim of conservation. Some inequalities attend all legal regulation, and must be borne, but the regulation itself must be on a fair principle and founded on good reason. Previous decisions have established a flat per well apportionment to be unreasonable, and also one which was substantially that, though some effect was given to well potential. We now hold that with the wide differences in well density and in well capacity that exists in the East Texas field, an apportionment of three-fourths on a flat per well basis is not justified by a good reason—is unreasonable.

As the conclusion from this holding, we will deny the temporary injunction to the Rowan & Nichols Company for the reason that one was denied in respect to the Humble Company, and we think it best to let matters go along on an even keel with no differences in the oil field. Permanent injunctions will be granted both to the Rowan & Nichols Company and to the Humble Company, but we do not wish to enter the injunctive decrees and upset the oil field until an opportunity has been given to decide the future of this case. For that reason, for the period necessary to

make a determination, about which we will hear you gentlemen, we desire that a decision be reached as to whether or not an appeal is to be taken, or whether the decision will be submitted to on the part of the Railroad Commission.

If it is to be submitted to, they probably would desire time to make a new order, in order to avoid upsetting the operations in the field. If it is to be appealed, we would, of course, have to enter the final decrees that they might be appealed from, but the effect of it could be controlled by orders or supersedeas of the proper sort. So that is the practical situation that we wish to handle. If there is an appeal, of course, findings of fact in which we would want the assistance of counsel would have to be prepared, and perhaps more exact or more elaborate findings of law, conclusions of law, but this states our decision of the case.

If the Commission or its representative could indicate to us what time they would like to consider the future course of matters, we would be glad, of course, to understand what that time is, and fix it. We will have to separate, but we would be glad to take care of it by mail.

Mr. Cale: May it please the court, I would like some hour or so to confer with the Railroad Commissioners on their desire in the matter. At this point I can't definitely tell the court what position they will take. I presume they will pursue the course of an appeal, bu. in the event that is not their desire in the matter, I would like to have some time to discuss it with them and report back to the court.

Judge Sibley: That is an entirely reasonable time.

Mr. Baker: I want to be sure, if the court please, that I understand. I assume that the court had in mind that the Commission would be given a reasonable time to make an order that would remedy the situation, or at least do away with this order which the court has held to be unreasonable.

Judge Sibley: If they wish to, we will consider that.

Mr. Baker: Yes, sir.

Judge Sibley: But they say for the present they want to decide whether they are going to appeal.

Mr. Cale: That is correct. I would like to have an opportunity to confer with the Commission and see what their wishes are and report back some time this afternoon or after lunch at the court's pleasure.

Mr. Baker: If the Commission should——

Judge Sibley: We don't want to rush you to an hour.

Judge Allred: We don't want to limit the conference with the Commission, as to whether you will appeal or not. You can confer with them about whether they will call a hearing and perhaps pass another order. We will give you all of the time you need.

Judge Sibley: You can have all of the time you need to keep your business straight. That is the purpose of our question.

Mr. Cale: Yes, sir. We would like to have as much time in that regard as the court will give us. We would like to cooperate with the court as much as we can.

Judge Sibley: I think a week or ten days, if you want to consider the situation and arrive at a fixed conclusion that will be reasonable and right.

Mr. Cale: I understand the order will not be entered?

Judge Sibley: There will be no order entered at all within that time.

Mr. Cale: All right, thank you, sir.

Judge Allred: And, Judge, pardon me. I think the Commission would be entitled to this indication. If the Commission decides to hold a hearing—give notice and hold a hearing, with the idea in mind to prepare another order, we would be willing to extend that time.

Judge Sibley: I think so.

Judge Allred: They have to give ten days notice under the statute, if they want to do that.

Mr. Cale: Yes, sir, that is correct.

Judge Sibley: I really had in mind to give thirty days for a purpose of that sort.

Mr. Cale: We would appreciate having that time, your Honor. I didn't know what the court's disposition would be in regard to that matter. If you could give us thirty days——

Judge Allred: I think Judge Sibley meant we would give you ten days for the Commission to decide what they wanted to do, and if they wanted further time to give notice and have a hearing, we would be willing to give you thirty days, so as to give time to give that notice, as required. That is

my understanding. That was your understanding, wasn't it, Judge?

Judge Sibley: Yes.

Mr. Cale: Thank you, sir.

Judge Sibley: We will not hold the Pullman Company lawyers in attendance. We will have to decide that case a little more at our leisure. We can't decide it instantly, and we will file a decision when we reach it.

Mr. Moody: May I ask a question? All of the questions or exceptions and matters of that kind, I suppose, will be taken care of when the order is finally entered?

Judge Sibley: You don't need any exceptions now. They are obsolete.

Mr. Moody: Well, I wasn't sure about the new practice.

Judge Sibley: Well, we will take a recess. We will take a recess until two o'clock.

(The court then, at 12:10 o'clock p. m., Wednesday, February 21, 1940, recessed until 2:00 o'clock, of the same day, at which time the following proceedings were had:)

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## EXHIBIT "C".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION.

Civil Action No. 31.

HUMBLE OIL & REFINING COMPANY, *Plaintiff*,

*vs.*

RAILROAD COMMISSION OF TEXAS *et al.*, *Defendants.*

Final Judgment.

This action having been heard twice heretofore before statutory three-judge courts duly assembled on motions for preliminary injunctions, came on to be tried on its merits on February 13 to 16, 1940, before a statutory court of three judges, consisting Sibley, Circuit Judge, and McMillan and Allred, District Judges, and came the plaintiff, Humble Oil

& Refining Company, by its attorneys of record and announced ready for trial, and came the defendants, the Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson and G. A. Sadler, Members of said Commission, and Gerald C. Mann, Attorney General of Texas, in their official and individual capacities, by their attorneys of record and announced ready for trial, and it appearing that proper notice of this motion has been given to the Governor and Attorney General of Texas as required by law, and that the Court has jurisdiction of the parties and subject-matter involved in this action, and the Court, having heard the pleadings of the parties, the evidence and argument of counsel, and being fully advised, is of the opinion that the law and facts are with the plaintiff, and that the orders and schedules of the Railroad Commission of Texas for the East Texas field complained of in this action are unreasonable and void as to plaintiff, and deprive plaintiff of its property contrary to the statutes of the State of Texas and in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and inflict upon plaintiff daily and currently irreparable injury for which plaintiff has no adequate remedy at law; and the Court being of the further opinion that plaintiff will hereafter daily and currently suffer irreparable injury for which it has no adequate remedy at law, all contrary to the statutes of Texas and the Fourteenth Amendment as aforesaid, if orders which are the same or substantially the same as the orders complained of are enforced against plaintiff's properties and wells in the East Texas field; and the Court having afforded to the defendant, Railroad Commission of Texas, a period of ten days in which to decide whether it would write a new and valid order and schedules for said field or would appeal this action, and having been advised by said Commission that it would appeal and that it will not write an order and schedules for said field differing in any material respects from the orders and schedules complained of; and the Court being of the opinion that a permanent injunction should issue against the defendants as set out below;

It is therefore, Ordered, Adjudged and Decreed that the Railroad Commission of Texas, Lon A. Smith, Ernest O.

Thompson and G. A. Sadler, members of said Commission, and Gerald C. Mann, Attorney General of Texas, in their official and individual capacities, their successors, representatives, agents, servants, attorneys and employes be, and they are each and all hereby permanently enjoined from enforcing or attempting to enforce against plaintiff the proration orders promulgated by the Railroad Commission of Texas on September 11 and September 29, 1939, and January 24, 1940, and the schedules issued in connection therewith, for the East Texas field, as well as any and all other proration orders, rules, regulations and schedules which have been or may be promulgated by the Railroad Commission of Texas for the East Texas field which are the same or substantially the same, or similar to, or have substantially the same effect as, said orders and schedules, or which attempt to prorate the production among properties in the East Texas field on a basis which is the same or substantially the same as the basis applied in said orders and schedules.

It is further Ordered, Adjudged and Decreed that the defendants and each of them, their successors, representatives, agents, servants, attorneys and employees, are hereby permanently enjoined from denying to plaintiff tenders to move, or from interfering in any way with the transportation and marketing of the oil produced or to be produced in accordance with this judgment, and from suing for or from attempting otherwise to claim or collect penalties or to enforce forfeitures or in any other manner to penalize the oil or plaintiff, on account of the oil produced or to be produced in accordance with this judgment.

It is further Ordered, Adjudged and Decreed that the defendants and each of them, their successors, representatives, agents, servants, attorneys and employees, are hereby permanently enjoined from suing for or from attempting otherwise to claim or collect penalties from plaintiff or to seek to enforce forfeitures against plaintiff or from attempting in any other manner to penalize plaintiff on account of oil which plaintiff may have produced under the provisions of the preliminary injunction heretofore granted on August 11, 1939, in this action.

It is further Ordered, Adjudged and Decreed that all costs in this action are taxed against the defendants, except the

costs incurred in connection with plaintiff's second motion for a preliminary injunction, which latter costs are taxed against plaintiff.

The defendants having announced that they would appeal from the judgment in this action, and the court being of the opinion that the injunction should be stayed for a reasonable length of time within which the appeal can be perfected and prosecuted, it is further Ordered, Adjudged and Decreed that the enforcement of the injunction herein granted is stayed for a period of sixty (60) days from the date hereof.

The Clerk is directed to enter this judgment.

To all of the foregoing judgment, except that portion staying the injunction as above provided, the defendants in open court duly excepted.

Done at Houston, Texas, this the 19th day of March, A. D. 1940.

SAML. H. SIBLEY,
*Circuit Judge.*
JAMES V. ALLRED,
*District Judge.*
ROBERT J. MCMILLAN,
*District Judge.*

Approved as to form:
REX G. BAKER.

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## EXHIBIT "D".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION.

Civil Action No. 31.

HUMBLE OIL & REFINING COMPANY, *Plaintiff,*

*vs.*

RAILROAD COMMISSION OF TEXAS, ET AL., *Defendants.*

Findings of Fact and Conclusions of Law.

As required by Rule 52(a) of the Federal Rules of Civil Procedure, the court of three judges (consisting of Sibley,

Circuit Judge, and McMillan and Allred, District Judges) makes the following as its findings of fact and conclusions of law in the above numbered and entitled action, and the court directs that the Clerk of this Court file such findings and conclusions as part of the record in this action.

A.

Findings of Fact.

I.

Parties and Jurisdiction.

1. Plaintiff is a private corporation, duly organized and existing under the laws of the State of Texas, with its principal place of business in Harris County, Texas.

2. The Railroad Commission of Texas is domiciled in Travis County, Texas, and is the duly created and existing agency of the State of Texas, charged with the administration of the laws of the State of Texas governing the conservation of oil and gas and the production thereof. Defendants, Lon A. Smith, Ernest O. Thompson and G. A. Sadler, are the duly elected, qualified and acting members of and compose the Railroad Commission of Texas. Their official residences are in Travis County, Texas. Defendant Gerald C. Mann is the duly elected, qualified and acting Attorney General of Texas, with his official residence in Travis County, Texas. Proper notice of this action has been given to the Governor and the Attorney General of Texas, and proper service of process has been had upon all of the defendants. Furthermore, the defendants have filed their answer to the original and supplemental complaints.

3. This is a civil action. The amount in controversy exceeds $3000.00, exclusive of interest and costs. In this action, plaintiff has attacked certain orders of the Railroad Commission of Texas fixing top allowables and prorating the allowable production among properties in the East Texas Field on the ground that such orders as construed, applied and enforced against the plaintiff are without authority at law and are in contravention of the due

process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

4. The plaintiff asked for preliminary injunctions in its original and supplemental complaints, and hearings were had and judgments entered on motions for preliminary injunctions before three-judge statutory courts, and the action was subsequently tried on its merits before a three-judge statutory court. Such statutory courts were duly constituted and assembled under Section 266 of the Judicial Code, as amended.

II.

General Geologic Description of the East Texas Reservoir.

5. The East Texas Field is one huge reservoir embracing originally some 133,000 acres of land and at present including some 131,300 acres of land situated in Rusk, Gregg, Smith, Cherokee, and Upshur Counties, Texas; the field is approximately 40 miles long north and south, and averages about 4 miles wide east and west. The reservoir is in the Woodbine sand at an average depth of some 3,650 feet below the surface. In it the oil is confined by an impervious formation (Austin chalk) above, and an impervious formation (Georgetown lime) and water below. A cross section of the field extending from west to east has the shape of a vast obtuse-angled triangle with one of the short sides (westward) of the triangle resting on the water table as a base, with the other short side of the triangle (being a portion of the impervious bed of Georgetown lime) extending eastward and upward, and with the longest or top side extending from the point of contact between the oil, the water and the impervious roof on the west side of the structure, along such roof upward and eastward to the eastern extremity of the field. On the extreme west edge the oil-saturated portion of the sand is very thin, being less than a foot or so in thickness; going eastward it gradually increases in thickness to the middle of the oil-saturated portion of the reservoir, or the so-called "fairway", where the oil sand attains a maximum thickness of about 90 to 100 feet; then the oil-saturated sand gradually decreases in thickness until it is pinched out and vanishes

on the east edge of the field. The Woodbine sand extends in a westerly and upward direction from the field to an outcropping some 100 to 150 miles west and northwest of the field. Underlying approximately the west half of the oilbearing sand and extending westward and upward to the outcropping is a vast amount of salt water occupying practically all of the Woodbine sand except that occupied by oil and gas. This salt water exerts pressure against the oil and gas in the reservoir. The pressure originally was some 1,650 pounds per square inch, but as the field has been produced the pressures have been reduced, and a pressure gradient has been built up across the field from west to east ranging from an average of nearly 1200 pounds per square inch on the west to an average of about 900 pounds per square inch on the east. The pressure of the water is the principal source of reservoir energy. As wells are drilled into the producing sand, the reservoir pressures and the expansion of the gas in solution in the flowing wells, force the oil to the surface through the wells, thus affording the energy by which the field is produced. With respect to pumping wells, artificial means must be used to lift the oil to the surface. The differential in pressures from west to east tends to drive the oil, as the field is produced, from west to east.

6. Gas is dissolved in the oil and will not come out of solution until pressures are reduced to approximately 750 pounds per square inch on the average. The presence of the dissolved gas makes the oil less viscous, and materially increases its capacity to move through the pore spaces in the sand. If pressures are so reduced that gas comes out of solution, it will form bubbles in the producing sands and the oil will become more viscous, thus materially impairing the ability of the oil to flow through the sands. Gas has already come out of solution in a small area in the southeastern portion of the field.

7. Furthermore, experience has shown that the field cannot for any extended period produce at a rate materially in excess of 400,000 barrels of oil per day without causing waste, considering that an average of about 200,000 barrels of water daily are currently being produced from the field

with about 400,000 barrels of oil. If the top allowable for the field is placed too high, the reservoir pressure will drop rapidly and create conditions conducive to waste; and, considering the varying densities to which properties in the field have been drilled, there will be non-ratable withdrawals from the field, if much of the allowable be prorated on the per-well or per-well potential basis, or any basis giving too much value to wells or potentials, thus resulting in an uneven or irregular rise of the water table. This will cause large quantities of oil to be trapped off or enveloped by what is known as coring or channeling of the water, and will greatly reduce the ultimate recovery from the field, thus causing physical waste..

8. The Woodbine sand, in which the oil and gas are found in the field, is a very porous and highly permeable sand; there is intercommunication between all parts of the reservoir, thus permitting rather free movement of oil and gas from one portion of the reservoir to another. The fluids flow from areas of higher to areas of lower pressure, thus resulting not only in local migration, but also in a general movement or encroachment upward and eastward of water from the west, being a normal movement in the light of the pressure gradient across the field, high on west, lower in the east. A well drilled into the reservoir and operated under proper conditions of control of reservoir pressure will effectively drain an area of at least ten acres.

9. The number of acre-feet of net effective oil sand in the field, or in a lease in any portion of the field, can be determined actually and relatively with reasonable accuracy by taking into consideration such factors as the number of acres of land in a lease and the average thickness of the net oil sand under the lease. It is likewise possible to determine with reasonable accuracy, actually and relatively, the quantity of oil per acre-foot of net effective oil sand, and the quantity of recoverable oil in the field and in the various leases in the field assuming the conditions under which the field is to be operated.

III.

Extent and Location of Plaintiff's Properties.

10. Plaintiff owns leases covering approximately 14,656 surface acres of land within the producing limits of the field. Such leases comprise approximately 11.4% of the producing acreage within the field. Some of its leases lie in the western portion and some in the eastern portion; but most of its leases are situated along a line running in a northerly and southerly direction near the middle of the field; that is, for the most part, its leases are located in the so-called "fairway", or that portion of the field where the producing sands have the greatest thickness and largest quantity of recoverable oil in place.

IV.

The Oil Reserves in the Field and Under Plaintiff's Leases.

11. Plaintiff's leases originally contained approximately 14.3% of the acre-feet of net oil sand in the field. The average thickness of the net oil sand under plaintiff's leases was 48.29 feet, while the average thickness of the net oil sand under the field as a whole was 37.78 feet.

12. Competent petroleum engineers and geologists will agree fairly well concerning the amount of oil per acre-foot of net oil sand in place in the East Texas Field. The percentage of the oil which can be recovered per acre-foot depends upon the manner in which the individual wells and the field as a whole are operated. If a proper allowable for the field and ratable production are maintained, a higher rate of recovery per acre-foot may reasonably be expected than if the allowable for the field is excessive, or if excessive localized withdrawals are permitted. The opinions of competent engineers and geologists may vary as to what the actual rates of recovery per acre-foot in the field will be in the future, due in part to their differences in assumptions as to the conditions under which the field may hereafter be operated. Such possible variances in recovery figures would not materially change the percentage of the total volume of recoverable oil in the field which lies under

plaintiff's leases. Whether the rate of recovery per acre-foot in the field be high, medium, or low, plaintiff's percentage of the oil actually recovered (by itself or others) should not vary materially, due to the relation which exists between the number of acre-feet of oil sand under its leases compared with the number of acre-feet of oil sand in the field as a whole.

13. Up to June 1, 1939, the field had produced approximately 1,365,000,000 barrels of oil. Of this amount, plaintiff's leases produced approximately 131,000,000 barrels, or only about 9.6% of that portion of the original reserves which had been depleted up to that time. Plaintiff has been permitted in the past to recover only 11/15 as much oil per acre-foot of its oil sand depleted as the field as a whole has been permitted to produce per acre-foot of sand depleted.

14. At the present time the amount of net oil sand under plaintiff's leases is at least 14.3% of the total net oil sand now in the field; and it now has under its leases at least 14.3% of the total remaining recoverable reserve of oil in the field.

V.

Comparative Drilling Densities in the East Texas Field.

15. The East Texas field has been drilled to an average density of one well to approximately 5.17 acres. Plaintiff's properties have been drilled to an average density of one well to about 5.8 acres. Properties in the field other than plaintiff's properties have been drilled to a density of one well to approximately 5.1 acres. While the Commission's rule which provides for well spacing, known as Rule 37, has been changed from time to time, more than 65% of the wells completed in the field have been drilled under permits granted by the Commission in exception to the rule. Since early in 1933, a 10-acre spacing rule has been in force. There is no uniformity of spacing in the field. Many areas in the field have been very densely drilled; for example, on 109 acres, some 360 wells have been drilled to a density of 0.1 and 0.4 of an acre, or an average density

of .3 of an acre per well. On 374 acres in the field, some 523 wells have been drilled to a density between .5 to .99 of an acre, or to an average density of .71 of an acre per well. On 2013 acres some 1336 wells have been drilled to a density of between 1 and 1.9 of an acre, or an average density of 1.5 acres per well. On 5637 acres some 2237 wells have been drilled to a density between 2 and 2.9 of an acre, or an average density of 2.5 acres per well. On 30,160 acres some 7331 wells have been drilled to a density between 3 and 4.9 of an acre, or to an average density of 4.1 acres per well. On 57,483 acres some 9879 wells have been drilled to a density between 5 and 6.9 of an acre, or to an average density of 5.85 acres per well. On 37,159 acres some 4128 wells have been drilled to a density of 7 acres or more per well, or an average density of 9 acres per well.

## VI.

## The Allowable Schedules and the Basis of Allocation Under Order of June 19, 1939.

16. The defendant Railroad Commission's statewide order of June 19, 1939, which became effective at 7:00 A. M., July 1, 1939, provided for an allocation of production on the basis of 2.32% of the hourly potential capacity of the several wells in the field as determined by the Commission. Such hourly potentials were determined by taking potential tests on some seventy key wells. Using these wells as control points, contour lines of equal potential were drawn. Wells other than key wells, falling between the contour lines, were then assigned potentials based on their relative positions with respect to the contour lines, whatever their actual potentials in realty may have been. Such a method of calculating or determining potentials necessarily involves the assumption, or finding, that relatively uniform conditions exist over wide areas adjacent to each key well. In connection with the proration order of June 19, 1939, the Commission issued its allowable schedule under which it fixed the daily allowable production for the various wells in the field, and issued a shutdown order, shutting down the entire field on certain specified days. These orders became effective July 1, 1939, and under their terms were to

continue in effect until 7:00 A. M., October 1, 1939. From an examination of the schedules, it appears that the above proration order as construed, applied and administered by the Commission, allocated production among the various wells in the field, on the days on which the wells were permitted to produce, on substantially the following basis:

(a) The field allowable was approximately 521,500 barrels per day.

(b) Wells incapable of making 20 barrels per day, which were classed as marginal wells, were permitted to produce all of the oil they were capable of producing. There were some 559 wells so classified, and they produced approximately 6400 barrels per day.

(c) Wells capable of producing 20 barrels per day, or more, and to which the Commission assigned hourly potentials of less than 865 barrels, were permitted to produce exactly 20 barrels per day. There were some 18,951 such wells to which were allocated approximately 379,000 barrels per day.

(d) Wells which were assigned an hourly potential of 865 barrels, or more, were permitted to produce 2.32% of the assigned hourly potential. There were some 6300 such wells to which were allocated approximately 135,900 barrels per day.

To each non-marginal well was allocated 20 barrels per day. Only between 7000 and 10,000 barrels per day were prorated among the 6300 wells having more than 865 barrels hourly potential. The actual range of allowable was from 20 barrels to slightly less than 26 barrels per day. In substantial effect the order was a per-well order. Under said order and schedules, plaintiff was permitted currently to produce 9.932% of the field allowable. Had plaintiff's allowable been based on comparative reserves, it would have been 44% higher than it was.

Such allocation gave no separate consideration to acreage, sand thickness, bottom hole pressure, position on structure, the number of acre-feet of oil sand in a lease, or the recoverable reserves under a lease.

17. After a hearing before a statutory three-judge court on plaintiff's motion for preliminary injunction, the court found the order and schedules of June 19, 1939, unreasonable, confiscatory and void as to plaintiff, and on August 12, 1939, granted plaintiff a preliminary injunction, restraining defendants from enforcing said order and schedules against the plaintiff pending final disposition of this action on its merits, and permitting plaintiff to produce 144% of the schedules allowable for each of its wells in the East Texas field. Plaintiff duly executed and filed the required bond which was approved by the court. Plaintiff produced oil for a few days under the terms of the preliminary injunction. It was stipulated on the trial of this action on its merits that the defendants would never seek to enforce against plaintiff any fines, penalties or forfeitures, or to take any other action against plaintiff because of its having produced oil from its wells in the East Texas field to the extent that it was permitted to produce under the terms of the preliminary injunction.

## VII.

Allowable Schedules and Basis of Allocation Under Orders of September 11 and September 29, 1939 and January 24, 1940.

18. The Commission's proration orders for the East Texas field of September 11 and September 29, 1939 and January 24, 1940, and the schedules issued in connection therewith, are all substantially the same. Accompanying them were shut down orders, the shut down order of January 24, 1940, closing all wells in the East Texas field, except wells classed as marginal wells, for twelve days during the month of February, 1940.

19. The salient provisions of such proration orders and schedules are:

(a) They fixed a top allowable of approximately 691,000 barrels daily for the field.

(b) They allotted 20 barrels per day to each well capable of making that many barrels, or more. There were some

25,456 wells of this kind to which were allotted approximately 509,000 barrels per day under this particular clause of the order.

(c) To wells incapable of making 20 barrels per day they allotted what they could make. These wells were classed as marginal wells. There were some 514 such wells to which were allotted some 6245 barrels per day.

(d) the balance of the field allowable, amounting to about 176,000 barrels per day, was allocated among wells capable of making more than 20 barrels per day. Each such well received in addition to 20 barrels per day, an amount determined by multiplying the proratable oil, approximately 176,000 barrels per day, by a fraction whose numerator was the product of the well's hourly potential by its bottom hole pressure by the thickness of the saturated Woodbine sand underlying the well by the average number of acres per well in the lease, and whose denominator was the sum of such products for all of the wells in the field.

Thus, less than 1% of the field allowable was allocated to so-called marginal wells. About three-fourths of the field allowable was allocated among wells on a flat per-well basis of 20 barrels per day, and about one-fourth of the field allowable was allocated among those wells capable of making more than 20 barrels per day by use of the formula described in (d) above. All wells classed as non-marginal wells were permitted to produce only 17 days during February, 1940. The average actual daily allowable for the field and for the individual wells was reduced accordingly.

## VIII.

## Losses Sustained By Plaintiff Under Existing Order and Schedules.

20. Following is a comparison of plaintiff's allowables under the order of June 19, 1939, and the order of January 24, 1940:

| Field. | Plaintiff | Percent. |
|---|---|---|
| 522,000 b/d | 52,000 b/d | 9.932% |
| 691,000 b/d | 77,000 b/d | 11.17 % |

Plaintiff's increase due to increase in the top allowable for the field was 16,600 b/d, or 66% of its total increase. Plaintiff's increase due to distribution under the formula in February order was 8,400 b/d, or only 34% of its total increase, or about 9% of its allowable.

21. While plaintiff owns at least 14.3% of the remaining recoverable oil reserves in the field, as stated above, its current scheduled allowable is only 11.17% of the current scheduled allowable for the field. Considering shut-downs, its current actual allowable is 11.11% of the current actual allowable for the field. On the basis of comparative reserves, and considering the position of plaintiff's properties on structure, because of which some will produce less and some more than the reserves under them at the present time, plaintiff is nevertheless currently deprived of an opportunity to produce 3.13% of the field scheduled allowable or 3.19% of the field's actual allowable. This amounts to a restriction of about 29% on plaintiff's current allowable.

22. (a) As stated above, the flat allowable of 20 barrels per well per day consumes approximately ¾ths of the field allowable, and only about ¼th of the field allowable is apportioned among wells under the formula mentioned in Paragraph 19 (d). The poorer wells and properties, as well as the better wells and properties, share in this apportionment; that is the poorer wells and properties are permitted to receive an allowable over and above the flat 20 barrel minimum. The discriminations complained of result almost entirely from the use of the 20 barrel minimum. No good reason is shown why a minimum per-well allowable of 20 barrels per day, is necessary. If the entire field allowable were apportioned in accordance with the factors mentioned in Paragraph 19(d) with no per-well minimum, plaintiff's properties would be permitted currently to produce slightly in excess of 14.3% of the current field allowable. It appears that, without using the per-well minimum, the factors employed can be given such values in a formula that a reasonable method of distribution can be effected.

(b) As a consequence of the method of allocation used, densely drilled leases in any part of the field receive much

more allowable in proportion to reserves than neighboring leases less densely drilled; and leases in the eastern and western portions of the field, where the oil sand is relatively thin, are allotted much higher allowables in proportion to their reserves than are leases in the fairway where the oil sands are thickest and the reserves greatest. The so-called fairway properties, except those which are very densely drilled, are being and will be severely drained by the leases lying in the eastern part of the field. Under the existing order, or orders similar thereto, the less densely drilled areas and particularly leases in the fairway, are not afforded an opportunity currently to recover their fair share of the oil, and probably will not ultimately be afforded an opportunity to recover substantially the equivalent of the recoverable reserves under them; while the densely drilled leases and leases particularly in the eastern portion of the field are currently afforded an opportunity to recover far in excess of their fair share, and ultimately will probably be afforded an opportunity to produce far in excess of the equivalent of the reserves underneath them.

(c) Under open flow conditions, properties in the fairway would have a distinct advantage over properties on the west side and properties on the east side of the field in enjoying recoveries in comparison with reserves. This is because, under open flow conditions, water would rapidly encroach and flood the oil sands on the west, and pressures would rapidly decline in the eastern portion of the field, while in the fairway water encroachment and pressure decline would be delayed. No sufficient explanation has been given as to why it is necessary, under conditions of control, to restrict fairway properties and wells and to favor west side and particularly east side properties and wells in such manner as to bring about the result complained of by plaintiff.

23. Under the orders and schedules complained of by plaintiff, assuming that the wells on tracts adjacent to each other have identical potentials, pressures, sand thickness and reserves, a 5-acre lease with five wells on it on the west side of the field would be permitted to produce about 5 times as much oil per day as an adjoining 5-acre lease

with only 1 well on it; a 5-acre lease in the fairway with 5 wells on it would be permitted to produce about 3 times as much oil per day as an adjoining 5-acre lease with 1 well on it; a 5-acre lease on the east side of the field with 5 wells on it would be permitted to produce about 5 times as much oil per day as an adjoining 5-acre lease with 1 well on it. This is representative of what actually takes place. Moreover, most leases on the west side and practically all, if not all of the leases on the east side of the field are permitted to produce several times as much oil per day in comparison with reserves as are leases in the fairway, excepting those fairway leases which are very densely drilled.

In general, this results in severe drainage from leases in the fairway to leases in other parts of the field, or, to put it another way, the result is that, in general, leases in the fairway are not permitted to obtain current, and may not obtain ultimate, recoveries on a basis comparable to recoveries permitted to lease in other parts of the field. Plaintiff's leases, for the most part, are located in the fairway, and this accounts in a large measure for the severe drainage that its leases are currently suffering under the existing orders and schedules, and will probably ultimately suffer if such orders and schedules are maintained in force.

24. The arbitrary allocation of about three-fourths of the field allowable on a flat per well basis of 20 barrels bears no relation to the prevention of physical waste, and is not justified by the necessities of the case.

## IX.

### Plaintiff Has Enough Wells.

25. Plaintiff having drilled its leases to an average density of approximately one well to 5.8 acres, already has more than enough wells to recover efficiently and effectively, without waste, the recoverable oil in its leases, and to produce its proper share of the allowable production. One well will effectively drain more than 10 acres on each of plaintiff's leases, and already it has drilled each of its leases to a density of less than 10 acres. The main factor working for prevention of waste in the East Texas field is the main-

tenance of a top allowable not materially exceeding the present figure with respect to total liquids produced. The per-well method of distribution tends to cause waste as a result of concentrated withdrawals where drilling is dense.

## X.

### Drilling and Production Costs in the East Texas Field.

26. It costs about $10,000.00 to drill and equip an oil well in the East Texas field. It costs about $2500.00 to equip a well with pumping equipment. Most pumping wells in the East Texas field can be operated at a profit on a daily production of as little as 5 barrels each. Many pumping wells in the field have been operated over a period of years on an average production of less than 5 barrels per day. A few pumping wells, if producing large quantities of water, may not be able to operate at a profit if producing no more than 5 barrels of oil per day; but if such wells were closed in, practically all, if not all, of the recoverable oil in the tracts on which such wells are located could be produced by other wells, and no substantial waste would result from the abandonment of such wells. Flowing wells in the East Texas field can be operated at a profit on less than 5 barrels per day average production.

27. Practically all wells in the field have been drilled more than two years, and have produced more than a sufficient amount of oil to pay for the cost of drilling, equipping and operating such wells. Some of the wells drilled within two years from this date have doubtless paid out, while many of the wells drilled less than two years ago have in a large measure paid out.

## XI.

### Efforts of the Plaintiff to Obtain Relief From the Commission.

28. Plaintiff has repeatedly and diligently endeavored to obtain administrative relief from the Railroad Commission of Texas, and to secure an adjustment of the allowable for its wells in the East Texas field in such manner as to

afford it an opportunity currently and ultimately to produce its fair share of the oil from the field. In spite of such efforts the defendant Commission has failed and refused to grant to plaintiff the relief sought.

## XII.

### Confiscation and Irreparable Injury.

29. The program of regulation outlined above results in the taking of plaintiffs's property and giving it to others, without any compensation and without any reasonable necessity. Plaintiff is deprived of a reasonable opportunity to produce currently a very substantial quantity of oil which it would be entitled to produce under a proper method of regulation. The loss to plaintiff under such a program amounts to a very large figure daily, and will probably amount to an enormous figure over a period of years if the program be continued. Even if plaintiff should be authorized to drill additional wells in an effort to increase its percentage of allowable production, and even if plaintiff should elect to drill such wells, it is mere speculation to say that its allowable would be materially increased, for it is reasonably certain that other operators would likewise be given permits to drill, and the result would be nothing more than further useless expenditure for wells, with little or no relative change in the distribution of the allowable as far as plaintiff is concerned. Since plaintiff already has enough wells to produce efficiently its allowable, should it be required to drill additional wells as a prerequisite to obtaining its proper allowable, confiscation would result to the extent of the unnecessary expenditure. There is nothing in the orders or program of the Commission which even suggests that the losses already incurred by plaintiff, and to be incurred by the present program, can or will be offset by increasing the allowable of the plaintiff in the future in order to make up for any losses which have occurred or may hereafter occur.

30. The regulation by the Commission does not allocate or distribute the allowable production for the field on a reasonable basis, and is arbitrary, discriminatory, con-

fiscatory, and unreasonable as applied to plaintiff. It denies to plaintiff a reasonable opportunity to recover its fair share of the oil ultimately, much less within a reasonable time, resulting in a daily loss of many thousand barrels of oil worth many thousand dollars.

B.

Conclusions of Law.

In view of the facts found above, concerning which there really is little or no dispute in the evidence, the following conclusions of law are applicable;

1. This court has jurisdiction of the persons and subject matter involved in this action.

2. Subject to the interests of its royalty holders, plaintiff is the owner of the oil and gas in place under its leases in the East Texas field.

3. As the owner of its several leases in the East Texas field, the plaintiff is legally entitled currently and ultimately to produce its fair share of the oil produced from the field.

4. Under the statutes of Texas, Articles 6023, 6029 and Section 7 of Article 6049-c, Vernon's Annotated Revised Civil Statute, the Railroad Commission is the administrative agency charged with the duty of preventing waste; and in administering the conservation statutes is required to apportion or allocate production of oil among properties in each field "on a reasonable basis."

5. The order of the Commission of June 19, 1939, for the East Texas field, and the schedules issued in connection therewith, as interpreted, applied and enforced against plaintiff were unreasonable and void as to plaintiff. They did not afford to plaintiff an opportunity to recover its fair share of the oil. As to plaintiff they did not allocate the production in the field on a reasonable basis as required by the Texas Statutes; and they deprived plaintiff of its property without due process of law and denied to it the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

6. The orders of the Commission of September 11 and September 29, 1939, and January 24, 1940, and the schedules issued in connection therewith for the East Texas field, as interpreted, applied and enforced against plaintiff (such orders and schedules being often referred to herein as the Commission's program of regulation for the field) are unreasonable, discriminatory, confiscatory and void as to plaintiff. As to plaintiff, they do not allocate the production in the field on a reasonable basis, as required by the statutes of Texas referred to in the preceding paragraph.

7. The program of regulation complained of by plaintiff does not within reasonable limits protect the property rights or privileges of plaintiff; it does not give to plaintiff the opportunity to produce currently its fair share, or prevent reasonably avoidable drainage of its properties considered as a whole, although plaintiff has more than enough wells already drilled on its properties from which its fair share can be produced without waste. To require plaintiff to drill any further or additional wells upon its properties would be to require plaintiff to make unnecessary and wasteful expenditures of money and, in itself, would be a confiscation of plaintiff's property.

8. Such program of regulation operates to confiscate plaintiff's property, and unreasonably discriminates against plaintiff, contrary to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States; and such program of regulation is void as far as plaintiff is concerned. It is not necessary to prescribe and enforce such a program of regulation against plaintiff in the East Texas field in order to prevent physical waste of oil and gas, or for any other reason.

9. Plaintiff is currently suffering immediate and irreparable injury under such program of regulation, and, so long as such program is maintained in force and effect, will continue to suffer irreparable injury, unless the defendants are enjoined from enforcing such a program of regulation against plaintiff in the East Texas field. Plaintiff is without an adequate remedy at law to protect itself against losses which have occurred and which will continue to occur

under the program of regulation now in vogue. Furthermore, the Texas Statutes (Acts of 1935, 44th Leg., Reg. Sess. p. 180, C. 76, Sec. 14; Sec. 8 of Article 6049c of Vernon's Annotated Revised Civil Statutes of Texas) apparently recognized that no adequate remedy at law exists in such an instance, for the statutes specifically authorize a suit for injunction against the Commission and the members thereof in a court of competent jurisdiction in Travis County, Texas, by any interested person affected, for the purpose of testing the validity of any statute, rule, regulation or order relating to the conservation of oil and gas. This court is a court of competent jurisdiction in Travis County, Texas.

10. The marginal well statute (Acts of 1931, 42nd. Leg., Reg. Sess., p. 92, C. 58; Article 6049b of Vernon's Annotated Revised Civil Statutes of Texas) is not patently invalid. Since it appears that less than 1% of the total daily allowable production from the field is allotted to marginal wells as defined by the Commission, the court finds it unnecessary to pass upon the validity of said marginal well law. There is nothing, however, in the marginal well law which requires the Commission to use the method of distribution and program of regulation now in vogue, or which prohibits the Commission from limiting non-marginal wells below the minimum allowable applicable to true marginal wells as defined by the statute.

11. The Texas statute, cited in Section 9 of these Conclusions of Law, provides that any interested person who is dissatisfied with the effect upon him of any statute, rule, regulation or order relating to the conservation of oil or gas may institute suit for injunction to test the validity of such statute, rule, regulation or order. The statute does not require that the complaining party first seek relief from the Commission, with respect to its acts which are claimed to be invalid, as a prerequisite to the seeking of an injunction. Furthermore, if the statute be properly interpreted to mean that relief should first be sought from the Commission, and even conceding that, as a general rule, relief from a court should not be sought if the same relief could promptly be obtained by application to the administrative

agency (Commission in this instance), then it appears that plaintiff, an interested person, has already sought such relief from the Commission and has fully exhausted its administrative remedy without obtaining relief.

12. The record shows virtually no dispute as to the facts. The law being clear as applied to such facts, the court finds that an injunction should issue, substantially as prayed for by plaintiff enjoining defendants from enforcing, or attempting to enforce, the orders and schedules complained of against plaintiff or its properties in the East Texas field, or from suing for or otherwise attempting to claim or collect penalties, or to enforce forfeiture, or in any other manner to penalize plaintiff or the oil produced as set forth in the final judgment to be entered in this action as directed by the court.

The final judgment is directed accordingly.

Done as of March 19th, 1940.

SAML. H. SIBLEY,
*Circuit Judge.*
JAMES V. ALLRED,
*District Judge.*
ROBERT J. MCMILLAN,
*District Judge.*

Endorsed: Civil Action No. 31 in the District Court of the United States for the Western District of Texas. Austin Division Humble Oil & Refining Company, Plaintiff vs. Railroad Commission of Texas, Lon A. Smith, E. O. Thompson and G. A. Sadler, and Gerald C. Mann, Attorney General of Texas, In Their Official and Individual Capacities, Defendants Statement As To Jurisdiction As Required By Supreme Court Rule 12 Original. Filed 1st day of April, 1940. Maxey Hart, Clerk, By Joe Steiner, Deputy.